86 1474 (2)

NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ELLIS S. RUBIN,

Petitioner,

v.

STATE OF FLORIDA,
and
FRED CRAWFORD,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

AMENDED APPENDIX*

ELLIS S. RUBIN
Counsel of Record For
Petitioner and a
member of The Bar
of this Court
c/o Ellis Rubin Law
Offices, P.A. and
I. MARK RUBIN
of counsel for
Petitioner and a
member of The Bar of
the Supreme Court of
Florida
c/o The Rubin Law Ctr
265 N.E. 26TH Terr.
Miami, FL 33137
305/576-5600

AMENDED APPENDIX TABLE OF CONTENTS

*AMENDED APPENDIX

*This Amended Appendix replaces the Appendix originally filed with the Petition in this cause. The cross reference below will correlate the original Appendix references (A) to Amended Appendix (AA).

CORRELATION TABLE

A	AA
A-1	AA-1
A-2	AA-3
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A-4	AA-6
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Those portions of the Appendix which were referred to as: A-22 through A-146 have been ommitted in the Amended Appendix.

SUPREME COURT OF FLORIDA

No. 69,048

ELLIS RUBIN, Esquire, Petitioner,

v.

STATE OF FLORIDA, Respondent,

[December 19, 1986]

District Court of Appeal,
3d District - No. 85-2370

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R.

App. P. 9.330(d),

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur
BOYD, J., dissents

The Motion to Strike filed in the above cause by attorney for Respondent is hereby denied.

McDONALD, C.J., ADKINS, BOYD, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

A True Copy
TEST:

Sidney J. White
Clerk Supreme Court

TC
cc: Hon. Louis J. Spallone, Clerk
Hon. Sidney B. Shapiro, Judge
Hon. Richard P. Brinker, Clerk

I. Mark Rubin, Esquire
Julie S. Thornton, Esquire

SUPREME COURT OF FLORIDA

No. 69,025

ELLIS RUBIN, Esquire, Petitioner,

v.

FRED CRAWFORD, Respondent,

[December 19, 1986]

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petitioner be and the same is hereby denied, and it is further

ORDERED that Petitioner's Motion to Consolidate and Amended Motion to Consolidate are hereby denied.

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

A True Copy

TC
cc: I. Mark Rubin, Esquire

Julie S. Thornton, Esquire

TEST:

Sid J. White
Clerk Supreme Court

SUPREME COURT OF FLORIDA

No. 69,025

ELLIS RUBIN, Esquire, Petitioner,

v.

FRED CRAWFORD, Respondent,

[December 19, 1986]

McDONALD, C.J., ADKINS, OVERTON, EHRLICH, SHAW and BARKETT, JJ., concur

Upon consideration of the Motion for Rehearing filed in the above cause by petitioner,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy
TC
cc: Ellis S. Rubin, Esquire
Julie S. Thornton, Esquire

TEST:

Sid J. White
Clerk Supreme Court

Ellis S. RUBIN, Appellant,

v.

The STATE of Florida, Appellee.

No. 85-2370.

District Court of Appeal of Florida,
Third District.

June 17, 1986.

Ellis S. Rubin, in pro. per

Jim Smith, Atty. Gen., and Michael J. Neimand, Asst. Atty. Gen., for appellee.

Before HENDRY, HUBBART and DANIEL S. PEARSON, JJ.

DANIEL S. PERSON, Judge.

This is an appeal from an order holding the appellant, an attorney, in contempt for refusing to comply with the trial court's earlier order requiring the attorney to represent his client, a

criminal defendant accused of murder, in a trial scheduled to begin immediately. We affirm.

Nearly a year before the contempt order was entered, this same attorney representing the same criminal defendant (one Russell Sanborn) in the same murder case asked the same trial judge for permission to withdraw as Sanborn's defense counsel, the request being made just before jury selection was to begin. Although clothed in language ostensibly designed to preserve the client's confiential communications to his attorney (e.g., Rubin alleged that the defendant "confided new and contradictory details and heretofore unknown explanations" and "issued certain instructions to Rubin as to the strategy and tactics to be employed at the trial"), Rubin's message

to the court was that the defendant had insisted upon testifying falsely at trial. Accordingly, Rubin asked that he be excused from further representation of the client. The trial court denied the motion to withdraw and ordered Rubin to proceed to trial.[1] Rubin sought certiorari review of that order. This court denied his petition and in so doing assured Rubin that he would carry out his ethical obligations as an attorney (as well as render all the effective assistance to the defendant to which the defendant was entitled) by allowing "The defendant to take the stand and deliver

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1. Because the withdrawal of an attorney from a pending court action potentially affects the rights of the client, other parties to the action, and, in a criminal case, the public interest, the withdrawal must be approved by the court,

his statement in narrative form" and be refusing to "elicit the perjurious testimony by questioning... [or to] argue the false testimony during closing argument." Sanborn v. State, 474 So.3d 309, 313 (Fla. 3d DCA 1985). Rubin's motions for rehearing and rehearing en banc were denied, and he sought no further review in any other court, state or federal. Despite this, when upon the issuance of our mandate the case was restored to trial calendar, Rubin again sought to withdraw on the same ground as before. The trial court, scrupulously adhering to its initial ruling and our mandate, again denied Rubin's motion and

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(ftnote 1 cont'd) Fla.R.Jud.Admin. 2,060 (i), and an attorney may not withdraw without such approval, Fla. Bar Code Prof.Resp. D.R.2-110(A). In the present case, the trial court, noting that

again ordered him to proceed to trial. When Rubin refused, the contempt order which gives rise to this appeal was entered.

The law of the case, established by this court in Sanborn v. State, 474 So.2d 309, is that even if Sanborn were to testify in the manner Rubin claimed he would, Rubin could ethically repre-

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(ftnote 1 cont'd) Rubin was the fourth attorney to represent Sanborn, recognized in its order the interest at stake: "The Court must and has considered the timing of counsel's motion, the inconvenience to witnesses, the period of time elapsed beween the date of the alleged offense and the scheduled trial date, and, most importantly, the possibility and probability that any new counsel will be confronted with the same conflict."

sent Sanborn by refusing to specifically elicit or argue such testimony. Rubin contends, however, as he did before the trial court, that our decision in Sanborn v. State is, in his view, wrong, and, because he firmly holds to that view, he disobeyed the lower court's order to proceed.

Rubin is certainly free to disagree and maintain his personal view of what the law is or should be, or indeed his personal view of what some higher law

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(ftnote 1 cont'd) While Sanborn may have agreed to Rubin's withdrawal and a further postponement of the trial, neither the state, the public, nor the court was bound by Sanborn's acquiescence, See generally Fischer v. State, 248 So.2d 479, 484 n. 5 (Fla. 1971) (noting public interest factor in withdrawal from criminal action.)

provides.[2] It is, however, the decision of the mortal judges in Sanborn v. State, having not been stayed, much less set aside, by some higher court with jurisdiction over the matter, which Rubin must obey. Thus, even if, arguendo, it might have been later determined that Sanborn v. State was wrongly decided, Rubin's contumacious refusal to follow the undisturbed order to proceed would be nonetheless punishable as a direct contempt. As will be seen, this rule of law is essential to the maintenace of our system of laws as a whole.

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2. When asked if there was any reason the trial court should not adjudge him in contempt and punish him, Rubin's sole answer was:

"Yes, your Honor I am obeying the Code of Professional Responsibility. There is not only an irreconcilable con-

It is well settled in this state, and elsewhere, that where a court acting with proper jurisdiction and authority renders an order, an aggrieved party's failure to abide by the order may be punished by contempt even if the order is ultimately found to be erroneous. Health Clubs, Inc., v. State ex rel. Eagan, 377 So.2d 28 (Fla. 5th DCA 1979), appeal dismissed sub nom., Cataldo v. Eagen, 383 So.2d 1191 (Fla. 1980) (appellant's failure to obey injunction found to be erroneous as overbroad, punishable by contempt). See also State ex rel, Buckner v. Culbreath, 147 Fla. 560, 3 So.2d 380 (1941); State ex rel, Pearson v. Johnson, 334 So.2d 54 (Fla.

(ftnote 2 cont'd) flict between my client and myself, but between myself and the finding of the District Court of

4th DCA 1976); Friedman v. Friedman, 224 So.2d 424 (Fla. 3D DCA 1969); Annot., Right to Punish for Contempt for Failure to Obey Court Order or Decree Either Beyond Power or Jurisdiction of Court or Merely Erroneous, 12 A.L.R.2d 1059 (1950). The reason behind the rule requiring obedience to court orders regardless of their alleged invalidity is that the need for obedience to a court order far outweighs any detriment to individuals who may be temporarily victimized by the order, even if erroneous.

"If a party can make himself a judge of the validity of orders which have

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(ftnote 2 cont'd) Appeal. I believe that I must rely on not only the Code of Professional Responsibility but my own code of honor and integrity. I have to live with myself and I could not live with myself knowing that I'm deceiving

been issued for the protection of property rights, and by his own act of disobedience can set them aside, then are the courts impotent, and what the Constitution of the state ordains as the judicial power becomes a mere mockery. "This power has uniformly been held indispensable to enable the court to enforce its judgments and to execute its orders necessary to the due administration of law and the protection of the rights of citizens."

Seaboard Air Line Ry. Co. v. Tampa Southern R. Co., 101 Fla. 468 at 476, 134 So.529 at 433 (1931).

Rubin's personal view that the decision in Sanborn is erroneous (a far cry from a judicial declaration that the decision

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(ftnote 2 cont'd) a jury with or without "court approval".

a judicial declaration that the decision is erroneous) quite obviously cannot excuse his disobedience.

This power to punish disobedience of court orders through contempt is unique to the judicial branch of government. As one court explained:

> "The criminal contempt exception requiring compliance with court orders ... is not the product of self-protection or arrogance of Judges. Rather it is born of an experience-proved recognition that this rule is essential for the system of work.... Disobedience to a legislative pronouncement in no way interferes with the legislature's ability to discharge its responsibilities (passing laws). The dispute is simply pursued in the judiciary and the legislature is ordinarily free to continue its function unencumbered by any burdens resulting from the disregard of its directives. Similarly, law enforcement is not prevented by failure to convict those who disregard the unconstitutional commands of a policeman. "On the other hand, the deliberate refusal to obey an order of the court without testing its validity through established processes requires

> further action by the judiciary, and therefore directly affects the judiciary's ability to discharge its duties and responsibilities. Therefore, 'while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.'" United States v. Dickinson, 465 F.2d 496, 510 (5th Cir.1972), cert. denied, 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973).

Our system of justice simply cannot function if individuals -- however strong their views -- are free to ignore court orders. Therefore, that Rubin may believe that his position is virtuous and his disobedience moral -- or that his view may some day, in some other case,[3] prevail -- does nothing to

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3. As we have already noted, Rubin sought no further relief from our decision in Sanborn after we denied

excuse his refusal to comply with the court's order to proceed with the defense of Sanborn, In Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967), a majority of the United States Supreme Court, acknowledging the contemnors' strong and principled belief that an order enjoining them from assembling in the streets without a required permit flagrantly infringed upon their constitutional rights, nonetheless felt constrained to uphold the contempt convictions of the civil rights marchers who disobeyed the injunction.

Recognizing that adherence to law in a constitutional system is central to the

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(ftnote 3 cont'd) rehearing and rehearing en banc, Sanborn now represents the law in this district until

existence of law itself, the Court wrote:

> "The rule of law that Alabama followed in this case reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioner's impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."
> Walker v. City of Birmingham, 388 U.S. at 320-21, 87 S.Ct. at 1832, 18 L.Ed.2d at 1219-20 (footnote omitted).

(cont'd 3 ftnote) changed by a later en banc decision, or by a decision of the Supreme Court of Florida.

Surely Rubin -- one trained in the law -- should know that if persons may with impunity disobey the law, it will not be long before there is no law left to obey.[4]

Affirmed.

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4. Rubin urges that if he followed our decision in Sanborn, he would have been exposed to prosecution for aiding and abetting Sanborn's perjury and Bar grievance proceedings. This argument is simply another way of saying that our decision in Sanborn was erroneous and is thus no defense to the contempt order. We do, however, note in passing that as a general rule a person's good faith reliance on a court order -- here, the decision in Sanborn -- is a complete defense to criminal prosecution, cf. Malley v. Briggs, 475 U.S. --, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (good faith reliance on warrant); Wright v. State of Florida, 492 F.2d 1086 (5th Cir. 1974) (good faith reliance on wiretap order); §934.10, Fla.Stat. (1985) (codification of rule that good faith reliance on court order is complete defense to illegal wiretap prosecution); §826.02(4), Fla.Stat. (1985) (codification of rule

(ftnote 4 cont'd) that good faith reliance on invalid divorce decree is complete defense to bigamy prosecution), and that, although only the Florida Supreme Court has jurisdiction over disciplinary matters, good faith reliance on a court order will likely not result in Bar discipline, cf. Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla.1978) (although trial court had no authority to immunize attorney from disciplinary proceedings, its decision to do so, justifiably based on Florida Supreme Court precedent, would be enforced).

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

Case No.: 84-010908
(Judge Shapiro)

State of Florida,

Plaintiff,

vs.

Russell J. Sanborn,

Defendant.

ORDER DENYING PETITION FOR
LEAVE TO WITHDRAW AS COUNSEL

Ellis S. Rubin, counsel for Defendant, RUSSELL J. SANBORN, filed a Petition for Leave to Withdraw as counsel for Defendant on the eve of trial. He contends that based upon information given to him by Defendant and defendant's mother on Thursday and Friday, April 25th and April 26th, 1985, he must

withdraw as defense counsel, a decision in which the Defendant concurs. He based his decision on several sections of the Florida Code of Professional Responsibility as cited in his Petition.

Defendant was initially appointed a Public Defender to represent him after he indicated he could not afford to retain private counsel. In July, 1984, he appeared before the Court, stated he had conflicts with his Public Defender, and requested a special assistance public defender be appointed to represent him. The Court (the undersigned Judge was on vacation) granted Defendant's request and appointed the attorney of defendant's choosing. A few weeks later the new defense counsel appeared before the Court and stated due to the fact he was a one man office he

could not adequately prepare a defense of this complicated case. He requested to be relieved of further responsibility. This Court granted counsel's request and appointed a third defense counsel, William Surowiec, to represent defendant.

The case moved forward toward trial with discovery being accomplished, but some month and a half ago the defendant decided he no longer was able to communicate with his counsel, appeared in Court and requested the Court to discharge counsel Surowiec and appoint a fourth attorney, Ellis Rubin, to represent defendant. This Court denied defendant's request.

Defendant's mother apparently was able to persuade Mr. Rubin to represent

defendant without charge. Counsel Rubin appeared before the undersigned, requested to be substituted as counsel and stated he would be ready to try this case as scheduled on April 25, 1985. This Court allowed the substitution after several assurances by Defendant himself that he would continue with Mr. Rubin as his counsel without question.

It is with the foregoing background that the instant Petition for Leave to Withdraw was placed before the Court.

This Court after thoroughly reviewing counsel's Petition, having heard argument from both counsel and comment from the Defendant, requested defendant's counsel to reveal that information which lead to the apparent conflict and problem between attorney and client. The Defendant refused to allow his

counsel to reveal the information to the Court either in open proceedings or in camera. This Court then ordered defense counsel to reveal the matter to the Court, in camera, which order defense counsel has refused.

The cases cited by defense counsel in support of his position, McNealy v. State, 183 So.2d 738 (Fla 1st DCA 1966), The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), and Automatic Data Processing etc. v. Scarberry, 412 So.2d 927 (Fla. 1st DCA 1982) do not support his contention. This Court has suggested a method whereby defense counsel can allow his client to testify, if that is the problem, which method was described during the hearing on this motion.

assistance of counsel" and "fair trial" are to be made by the Courts. A balancing of defendant's rights with the need for the Court to proceed in an orderly fashion must be met. A defendant cannot be permitted to dictate when and how a trial will proceed, and in this case, if it will proceed. This Court would expect every ethical lawyer appointed to represent defendant to be placed in the same position present defense counsel has been placed. Effectively, only an unethical lawyer would then be able to represent this defendant. This was never contemplated nor can this Court permit this result.

Based upon the foregoing, the Petition to Withdraw by defense counsel Ellis S. Rubin be and the same is hereby

denied. Pursuant to Florida Bar Disciplinary Rule DR 4-101 (D)(1), defense counsel is ordered to file with the Third District court of Appeal whatever documents required to avail himself of all appellate remedies available to him by 5:00 P.M. on April 30th, 1985.

DONE AND ORDERED in open Court this 29th day of April, 1985.

Sidney B. Shapiro
Circuit Judge

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

Case No.: 84-010908
(Judge Shapiro)

State of Florida,

Plaintiff,

vs.

Russell J. Sanborn,

Defendant.

ORDER ADJUDGING ATTORNEY
IN CONTEMPT OF COURT

THIS MATTER having come before the Court to be heard after the District Court of Appeal, Third District of Florida, entered its Order affirming the actions of this Court in denying a motion to withdraw as counsel of record filed by Ellis Rubin, Attorney for Defendant SANBORN, the Third District having denied the attorney's request to

rehear the issues en banc, this Court having received the "Status Report" filed by Attorney Rubin, and being otherwise fully advised in the premises, finds as follows:

1. Attorney Rubin is the fourth attorney representing Defendant Sanborn in the instant case.

2. Before this Court allowed Mr. Rubin to appear and assume responsibility for defending this case both the defendant and Mr. Rubin assured this Court the matter would be ready for trial on the scheduled trial date of April 29, 1985.

3. On that date Attorney Rubin filed his motion for leave to withdraw as counsel stating irreconcilable differences had developed between himself and

his client due to "certain things his client had advised Rubin the client was going to do at trial."

4. This Court, having reviewed the matter thoroughly, denied Attorney Rubin's motion for leave to withdraw and allowed an appeal to proceed without forcing the matter to trial.

5. The District Court of Appeal, Third District of Florida, issued its Order on July 16, 1985, wherein the Court discussed, at length, the problem presented to Mr. Rubin and this Court. The Appellate Court recognized the dilemma in which Rubin was placed but gave him a method to solve this dilemma which method would allow continued representation by Rubin of Sanborn and the case to proceed to trial.

6. This Court has given Attorney

Rubin a direct order to continue representing Defendant Sanborn and proceed to trial forthwith. Attorney Rubin has refused to comply with this Court's Order.[1]

7. This Court finds the actions of Attorney Rubin to be contemptuous and in direct criminal contempt of this Court. The Court has given Mr. Rubin the opportunity to state his reason why he should not be adjudged in contempt and punished for this contempt. The Court has further given Mr. Rubin the opportunity to present any evidence or excuse or mitigating circumstances.

Based on the foregoing findings of

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1. Attorney Rubin has always been respectful to this Court and while refusing to proceed has never done so in a discourteous manner.

this Court, it is concluded as follows:

1. The actions of Attorney Rubin constitute a contempt for which punishment must be imposed.

2. The District Court of Appeal has recognized as does this Court the primary responsibility of a trial Court is to facilitate the orderly administration of justice. This Court must balance this primary responsibility with the fact an irreconcilable conflict may exist between counsel and defendant. The Court must and has considered the timing of counsel's motion, the inconvenience to witnesses, the period of time elapsed between the date of the alleged offense and the scheduled trial date, and most importantly, the possibility and probability that any new counsel will be confronted with the same

conflict.

3. This Court further recognizes as has the Third District Court of Appeal and the Arizona Court in State v. Lee, 689 P.2d 153, 163-164 (1984), that counsel must within the confines of the law and his professional duties and responsibilities present his client's case as well as he can. The Appellate Court has outlined the procedure Attorney Rubin should follow. He has refused to do so. In so doing he has interfered with the orderly administration of justice. He has flaunted the authority of this Court in this "Court's face", although he has not done so in a discourteous manner.

Based on the foregoing findings of fact and conclusions of law, it is hereby Ordered and Adjudged as follows:

1. Attorney Ellis Rubin is found to be in direct criminal contempt of this Court and is adjudged in contempt of Court.

2. Attorney Rubin is hereby sentenced to serve thirty (30) days in the Dade County Jail for his contemptuous conduct.

3. The jail sentence is stayed pending any appeal Attorney Rubin wishes to file from this Court's Order and the disposition of this appeal.

4. Attorney Rubin is released on his own recognizance and shall remain free on his own recognizance through the exhaustion of appeals.

DONE AND ORDERED in Open Court this 13th day of September, 1985.

SIDNEY B. SHAPIRO
Circuit Court Judge

Copies furnished counsel of record

Russell J. SANBORN, Petitioner,

v.

The STATE of Florida, Respondent.

No. 85-949.

District Court of Appeal of Florida, Third District.

July 16, 1985.

Ellis S. Rubin, Miami, for petitioner.

Jim Smith, Atty. Gen., and Julie S. Thornton, Asst. Atty. Gen., for respondent.

Before NESBITT, DANIEL S., PEARSON and FERGUSON, JJ.

NESBITT, Judge.

Through a petition for writ of certiorari, the defendant's attorney, Ellis Rubin, requests this court to quash the trial court's order denying his motion

to withdraw as defense counsel.

The defendant is charged with first degree murder and a number of other crimes. In April 1984, the public defender was appointed to represent the defendant. In July 1984, the defendant requested that a special public defender be appointed due to conflicts with his then-attorney. The court granted the defendant's request and appointed the attorney of the defendant's choosing. A few weeks later, the newly appointed attorney appeared before the court and asked permission to withdraw, claiming that as a one-man office, he could not adequately prepare a defense in that case. The court granted this request and appointed a third defense attorney. The case proceeded toward trial, scheduled for April 29, 1985, until the

defendant decided he could no longer communicate with his attorney and, in February 1985, requested a fourth attorney, Rubin, be appointed. The trial court denied this request.

Subsequently, Rubin appeared before the court and requested to be substituted as defense counsel as he had been retained by the defendant's mother (apparently for no fee). Rubin represented to the court that he would be ready for trial on April 29, 1985. After several assurances from the defendant that he would continue with Rubin as his counsel, the court allowed the substitution.

On Thursday and Friday, April 25-26, 1985, Rubin confronted the defendant and his mother (an alleged key witness) "with facts and the results of physical evidence tests gathered through disco-

very" and the defendant and his mother "confided new and contradictory details and heretofore unknown explanations" to Rubin. In addition, the defendant "issued certain instructions to Rubin as to the strategy and tactics to be employed at the trial." Based on these events, Rubin petitioned the trial court on April 29, 1985, just prior to jury selection, to withdraw as defense counsel. The defendant did not oppose the withdrawal. During argument on the motion, the court asked Rubin to reveal the factual matters underlying his r tion. The defendant refused to consent to the disclosure and, therefore, Rubin correctly upheld his ethical obligation and refused to reveal the confidential communications. See Fla.Bar Code Prof.Resp., D.R. 4-101. Following

argument, the trial court denied Rubin's motion to withdraw and ordered him to proceed to trial.[1]

It is apparent from the record before us that the basis for Rubin's motion is that the defendant has directed Rubin to present evidence and/or testimony and argue facts which Rubin knows to be false. We recognize that Rubin, as an attorney, is placed in a serious dilemma between his role as an advocate of his client's best interests and as a guardian of the integrity of the judicial system in these circumstances. The ethical obligations of an attorney

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1. The trial court gave Rubin until the following day to seek review in this court. Rubin filed his petition for writ of certiorari in this court and we have stayed the proceedings below pending this decision.

require him to represent his client zealously, but this zealous representation must stay within the bounds of the law. Fla.Bar Code Prof.Resp., Canon 7. Looking first at Rubin's actions after learning of the "new ...details...and explanations" and being directed by defendant to proceed in a particular manner, we are of the opinion that Rubin has acted according to the moral and ethical obligations required of him as a member of the legal profession.

In representing a client, an attorney is held to strict requirements under the law and Florida's Disciplinary Rules which prohibit the use of fraudulent, false or perjured testimony or evidence. A lawyer may not knowingly use perjured testimony or false evidence or make a

false statement of law or fact. In addition, a lawyer may not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false; nor may he counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. Fla.Bar Code Prof.Resp., D.R. 7-102(A). See also Fla.Bar Code Prof.Resp., D.R. 1-102; The Florida Bar v. Agar, 394 So.2d 405 (Fla.1980). A lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible and credible evidence. Further, a lawyer should not by subterfuge put matters before a jury which the jury should not properly consider. See Fla.Bar Code

Prof.Resp., E.C. 7-25.

> The law requires honest, loyal, genuine, and faithful representation of a defendant by his attorney, whether employed or court-appointed. A lawyer's professional duty requires him to be honest with the court and to conform his conduct to recognized legal ethics in protecting the interests of his client. Counsel, however, is never under a duty to perpetrate or aid in the perpetration of a crime or a dishonest act to free his client. Neither is he required to stultify himself by tendering evidence or making any statement which he knows to be false as a matter of fact in an attempt to obtain an acquittal at any cost. In conducting his task, counsel should be guided by the standard [of using] "all fair and honorable means' ... in discharging the duty ... "to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law." [citations omitted]

State v. Henderson, 205 Kan. 231, 468 P.2d 136, 140 (1970). Accord Carr v. State, 180 So.2d 381 (Fla. 2d DCA 1965). See also Thornton v. United States, 357 A.2d 429, 437-38 (D.C.App.), cert.

denied, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976).

The high ethical standards required of a criminal defense attorney are not inconsistent with the zealous representation which is guaranteed an accused and which the attorney is obligated to provide. Instead, both are designed to achieve the truth-finding goal of our legal system. People v. Schultheis, -- Colo. --, 638 P.2d 8, 12 (1981) (En Banc). See also Henderson, 468 P.2d at 141. Our legal system provides for the adjudication of disputes governed by rules of substantive, evidentiary and procedural law. The objective of our system is to ascertain an accused's guilt or innocence in accordance with established rules of evidence and procedure designed to develop the facts

truthfully and fairly. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law. See Fla.Bar Code Prof.Resp., E.C. 7-19; Schultheis, 638 P.2d at 12. Henderson, 468 P.2d at 141.

The foregoing analysis does not mandate that a trial court allow an attorney to withdraw from a case whenever his client insists on presenting false testimony or evidence through either the client's own testimony or another witness' testimony. Regardless of the client's wishes, defense counsel must refuse to aid the defendant in giving

perjured testimony and also refuse to present the testimony of a witness that he knows is fabricated. When a serious disagreement arises between defense counsel and the accused, and counsel is unable to dissuade his client from insisting that fabricated testimony be represented, counsel should request permission to withdraw from the case. If the motion to withdraw is denied, however, he must continue to serve as defense counsel. So long as the attorney performs competently as an advocate under the circumstances, the defendant is represented effectively and the integrity of the adversary system of justice is not compromised. Schultheis, 638 P.2d at 13. See State v. Lee, 142 Ariz. 210, 689 P.2d 153, 163 (1984) (En Banc).

Rubin does not face such a serious dilemma with regard to the defendant's instructions regarding trial strategy and tactics. The power to decide questions of trial strategy and tactics ultimately rests with counsel. Lee, 689 P.2d at 158. Once such tactical, strategic decision concerns counsel's determination of what witnesses to call and what evidence to present. Id.; Schultheis, 638 P.2d at 12. Thus, a defendant cannot compel his counsel to call witnesses to present a fabricated alibi or any other false testimony, nor compel the introduction of false evidence. Schultheis, 638 P.2d at 12. See People v. Williams, 2 Cal.3d 894, 88 Cal.Rptr. 208, 471 P.2d 1008 (1970) (In Bank), cert. denied, 401 U.S. 919, 91 S.Ct. 903, 27 L.Ed.2d 821 (1971); State

v. Robinson, 290 N.C. 56, 224 S.E2d 174 (1976). See also United States v. Curtis, 742 F.2d 1070, 1074-75 (7th Cir.1984). Since a defendant's right to effective assistance of counsel does not include the right to require his attorney to perpetrate a fraud on the court, it is generally considered that a refusal to call a particular witness because of obedience to ethical standards which prohibit the presentation of fabricated testimony does not constitute ineffective assistance of counsel. See Schultheis, 638 P.2d at 12 and authorities cited. In fact, the Supreme Court of Arizona has held that succumbing to a client's demand to elicit obvious perjurious testimony from witnesses amounts to ineffective assistance of counsel since the attorney, thereby, fails to

fulfill his duty to make the tactical, strategic decisions at trial. Lee, 689 P.2d at 159.

Tactical decisions require the skill, training and experience of the advocate. A criminal defendant, generally inexperienced in the workings of the adversarial process, may be unaware of the redeeming or devastating effect a proffered witness can have on his case. Accordingly, in the present case, Rubin should disregard any instructions from the defendant concerning trial strategy and tactics if Rubin should determine that following the instructions would be either contrary to the defendant's best interest or contrary to Rubin's ethical obligations as an attorney.

The worst dilemma that could be facing Rubin in the present case is that

his client, the defendant, insists upon testifying falsely at trial.[2] If at trial, however, there remains a chance of perjured testimony being presented by the defendant, formulas have been proposed which preserve the sanctity of the tribunal and the ethical standards that Rubin, as an officer of the court, has vowed to uphold. The procedure most often sanctioned in this situation is to allow the defendant to take the stand and deliver his statement in narrative form; the defendant's attorney does not elicit the perjurious testimony by questioning nor argue the false testimony during closing argument.[3] See

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2. We emphasize that a lawyer's task is not to determine guilt or innocence but only to present evidence so that others

3. The seventh circuit recognized this procedure in Curtis, 742 F.2d at 1076-77

Coleman v. State, 621 P.2d 869, 881 (Alaska 1980), cert. denied, 454 U.S. 1090, 102 S.Ct. 653, 70 L.Ed.2d 628 (1981); People v. Salquerro, 107 Misc.2d 155, 433 N.Y.S.2d 711, 714 (N.Y.Sup.Ct. 1980); State v. Covington, 279 S.C. 274, 305 S.E.2d 578, 580 (1983). The attorney, of course, is not precluded from arguing sound, non-perjurious testimony or attacking the state's case. Under this procedure, a defendant is afforded his right to speak to the jury under oath and the constitutional right to assistance of counsel is preserved, but the defense attorney is protected from participating in the fraud. Under such a formula, the responsibility for com-

(ftnote 2 cont'd) either court or jury can do so. A lawyer, therefore, should

(ftnote 3 cont'd) n.4. The court, however, took the approach that although

mitting or not committing fraud on the tribunal lies with the defendant, and not with his attorney, and the jury will decide whether the defendant's testimony is credible. Salquerro, 433 N.Y.S.2d at 713-14.

Rubin argues, however, that such procedure would deny the defendant effective assistance of counsel. We disagree. Although a defense attorney has an ethical duty to zealously represent his client, that duty must be met in conjunction with, rather than in opposition to, other professional obligations, The ethical strictures under which an attorney acts forbid him to

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(ftnote 2 cont'd) should not decide what is true and what is not unless there is is compelling support for his

(ftnote 3 cont'd) a defendant has a

tender evidence or make statements which he knows to be false. Thornton, 357 A.2d at 437-38. It is axiomatic that the right of a client to effective assistance of counsel in any case does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation of false evidence. Salquerro, 433 N.Y.S.2d at 714 (quoting ABA Informal Opinion 1314). See also Coleman; Thornton; Covington; Maddox v. State, 613 S.W.2d 275, 284 (Tex.Crim.App.1980). Certainly, the constitutional right to effective assistance of counsel does not encompass

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(ftnote 2 cont'd) conclusion. State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978).

(ftnote 3 cont'd) constitutional right to take the stand and testify truthfully

the right to an unethical attorney when a criminal defendant thinks it is in his best interest to present false evidence.

The trial court recognized that allowing Rubin to withdraw and appointing a fifth defense attorney would not alleviate the problem. If withdrawal were allowed every time a lawyer was faced with an ethical disagreement with the accused, the ultimate result could be a perpetual cycle of eleventh-hour motions to withdraw and an unlimited number of continuances for the defendant. In addition, new counsel might fail to recognize the problem of fabricated testimony and false evidence

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(ftnote 2 cont'd) Mere suspicion or inconsistent statements by the defendant alone are insufficient to

(ftnote 3 cont'd) in his own behalf, counsel may refuse to allow a defendant

would be represented to the court; or, perhaps the defendant might eventually find an attorney who lacks ethical standards and who would knowingly present and argue false evidence. Neither result is acceptable since fraud is committed upon the court in either case. Schultheis, 638 P.2d at 14-15; Salquerro, 433 N.Y.S.2d at 713. See also Coleman, 621 P.2d at 882; Henderson, 468 P.2d at 142; Covington, 305 S.E.2d at 579. As the New York court has stated:

> If the motions to withdraw and recuse are granted, substitution of court and counsel, unaware of the possibility of perjury, may overtly facilitate, or appear to condone, a fraud

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(ftnote 2 cont'd) establish that the defendant's testimony would have been false. Whiteside v. Scurr, 744 F.2d

(ft note 3 cont'd) to testify when it is clear the defendant will testify per-

> upon the court. Such substitution procedures would effectively cloak the problem; however, this ostrich-like approach would do little to resolve it.

Salquerro, 433 N.Y.S.2.d at 713.

For this reason, trial courts are given broad discretion to determine whether a motion to withdraw should be granted in situations like the present one. The primary responsibility of the court is to facilitate the orderly administration of justice. See Schultheis, 638 P.2d at 15 and cases cited. In making the decision of whether to grant counsel permission to withdraw, the trial court must balance the need for orderly admi-

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(ftnote 2 cont'd) 1323, 1328 (8th Cir.1984), cert. granted. -- U.S.--, 015 S.Ct. 2016, 85 L.Ed.2d 298 (1985).

(ftnote 3 cont'd) juriously. The court did not discuss the possibility of the defendant testifying truthfully in part.

nistration of justice with the fact that an irreconcilable conflict exists between counsel and the accused. In doing so, the court must consider the timing of the motion,, the inconvenience to witnesses, the period of time elapsed between the date of the alleged offense and trial, and the possibility that any new counsel will be confronted with the same conflict. Schultheis, 638 P.2d at 15. Accord Lee, 689 P.2d at 163; Covington, 305 S.E.2d at 579. As long as the trial court has a reasonable basis for believing that the attorney-client relation has not deteriorated to a point where counsel can no longer give

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(ftnote 3 cont'd) By quoting the procedure suggested by the ABA Standards for Criminal Justice in a footnote, however, the court impliedly indicated that a defendant may have a constitutional

effective aid in the fair presentation of a defense, the court is justified in denying a motion to withdraw. See Henderson, 468 P.2d 141; Schultheis, 638 P.2d at 15. The decision of a trial court to deny a motion to withdraw will not be disturbed absent a clear abuse of discretion. Under the circumstances of the present case, we find that the trial court did not abuse its discretion by requiring Rubin to remain as the defendant's advocate.

We approve the Arizona supreme court's position on this troublesome problem that many criminal defense attorneys are confronted with:

> If "irreconcilable conflicts" arise between a particular defendant and a

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(ftnote 3 cont'd) right to take the stand in such a situation.

> string of attorneys, we trust the trial court will, when the orderly administration of justice requires, refuse permission to withdraw. In such a case, counsel must, with in the confines of the law and his or her professional duties and responsibilities, present the client's case as well as he or she can. A criminal defendant is entitled to full and fair representation within the bounds of the law. If he or she is dissatisfied with the representation to which he or she is entitled in our system, self-representation is available. Counsel must not compromise the integrity of his or her client, the court, or the legal profession by exposing a client's proclivities or by engaging in an ethical conduct at a client's request.

Lee, 689 P.2d at 163-64. We note that although this is a case of first impression in Florida, most courts that have considered this problem in other jurisdictions have resolved it in the same manner as we do here. See, e.g., Lee; Schultheis; Thornton; State v.

Whiteside, 272 N.W.2d 468 (Iowa 1978);[4] Henderson; Salquerro; Robinson; Covington. Cf. Anderson v. State, 439 So.2d 961, 962 (Fla. 4th DCA 1983) ("The trial judge did not abuse his discretion when he denied counsel's eleventh hour motion to withdraw based on a mere speculation as to the nature of the victim's testimony.")

Accordingly, the petition for writ of certiorari is denied.

DANIEL S. PEARSON, Judge concurring.

I concur in the decision to deny the petition for certiorari and thereby uphold the trial court's order denying Mr. Rubin's motion to withdraw as counsel for Sanborn. I believe, however, that the majority's dicta, "deciding:

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4. We note that the Iowa supreme court's decision on this issue in

that Rubin will be both ethical and effective, if, at trial, he disowns defense testimony he perceives to be perjurious, constitutes an uncalled for advisory opinion.

According to Rubin, the trial court's ruling forces him to choose between his obligation to further the administration of justice and his obligation to provide his client with effective assistance. The majority attempts to assure Rubin that he has no dilemma, and tells Rubin that if he conducts himself in the forthcoming trial in the manner prescribed by the majority, he will be both ethical and effective. Yet, there is now, and there has been for some time, a very serious question whether an

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(ftnote 4 cont'd) Whiteside has been effectively overruled by the Eight

attorney who, attempting to live up to the code of professional responsibility, refused to elicit or argue his client's known perjurious defense, nonetheless provides effective assistance of counsel. See Whiteside v. Scurr, 744 F.2d 1323 (8th Cir.1984); Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich.L.Rev. 1469 (1966); Noonan, The Purposes of Advocacy and The Limits of Confidentiality, 64 Mich.L.Rev. 1483 (1966); Bress, Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility, 64 Mich.L.Rev. 1493 (1966). Hopefully, the United States

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(ftnote 4 cont'd) Circuit Court of Appeals on a petition for writ of habeas corpus. Whiteside v. Scurr, 744 F.2d

Supreme Court, which, as the majority notes, has granted certiorari in the Whiteside case, see majority opinion at 314 n.4, will answer this question. For now, I think we should wait and see what Rubin does at trial and whether Sanborn is convicted. In the event Sanborn is convicted, he through other counsel, will likely present to a court, in the setting of an actual controversy, his contention that although Rubin may have behaved ethically, he was ineffective. Obviously, that contention is not before us now.

(ftnote 4 cont'd) 1323 (8th Cir.1984). The Eight Circuit, however, is sharply divided on the issue. The panel opinion withstood a motion for rehearing en banc five-four vote which produced four separate opinions. Whiteside v. Scurr, 750 F.2d 713 (8th Cir.1984) (denying

(ftnote 4 cont'd) motion for rehearing en banc). The Supreme Court has recently granted certiorari in the case, Nix v. Whiteside, -- U.S. --, 105 S.Ct. 2016, 85 L.Ed.2d 298 (1985), (certiorari granted), and, therefore, attorneys may soon be given some definitive guidance as to the proper action to be taken when their ethical obligations seemingly come in conflict with their client's constitutional rights.